No. 87-107

In The

Supreme Court of the United States

October Term 1987

BRENDA PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CENTER FOR CIVIL RIGHTS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The Landmark Legal Foundation Center for Civil Rights is a public interest law center dedicated to promoting the core principles of civil rights: equality under law and fundamental individual rights.

A vital aspect of this mission is defending the integrity of the civil rights laws. That requires challenging precedents in which the aims of civil rights laws have been frustrated, *see, e.g., Slaughter-House Cases*, 83 U.S. 36 (1873) (holding economic liberty not within the privileges

or immunities clause of the 14th Amendment), as well as precedents, as here, that far exceed the laws' objectives. Fidelity to our nation's commonly shared principles as expressed in the civil rights laws is crucial to the ultimate sanctity of civil rights.

SUMMARY OF ARGUMENT

The integrity of our civil rights laws depends upon judicial construction faithful to the intent of the laws. In *Runyon* v. *McCrary*, 427 U.S. 160 (1976), the Court erroneously found in 42 U.S.C. § 1981 an intent to compel private individuals to enter into contracts against their will. This interpretation is inconsistent with the statute's plain language, with its legislative history, and with roughly contemporaneous judicial interpretations and subsequent actions by Congress. Viewed in its historical context, the law was plainly designed to eradicate state action that deprived blacks of contractual liberty and to invest in blacks the legal capacity to make and enforce contracts, not to reach purely private actions such as refusals to enter into contracts.

This was the understanding of this Court for nearly a century until *Runyon*. In *Runyon*, the Court embarked upon a course of activism that has forced it to decide issues that were never contemplated by the law's framers. The Court may extricate itself from this extrajudicial quagmire only by overruling *Runyon*. Rather than relying on Congress to take such action, the Court should correct its own error.

ARGUMENT

I. CONGRESS NEVER INTENDED § 1981 TO REACH PRIVATE CONDUCT, PARTICULARLY REFUSALS TO ENTER INTO CONTRACTS

Justice White was correct in his dissent in *Runyon* v. *McCrary*, 427 U.S. at 195 (White, J., dissenting), that the plain language of 42 U.S.C. § 1981 does not extend to private conduct, and also that the statute in its present form is based on the authority of the 14th Amendment, which controls only state action. *Id.* at 201-202. Either fact should have ended this Court's inquiry in *Runyon*, and would justify corrective action here in overruling *Runyon*.

Moreover, an examination of the circumstances surrounding the adoption of the Civil Rights Act of 1866, to which not only the operative language of §§ 1981 and 1982 but also the joint resolution that was later adopted as the 14th Amendment trace their origins, *see General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 384 (1982), only reinforces this view. This legislative history leaves "no doubt" that the construction of § 1981 in *Runyon* "would have amazed the legislators who voted for it." *Runyon*, 427 U.S. at 189 (Stevens, J., concurring).

"[L]aws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947). The circumstance motivating the enactment of the 1866 Act was the widespread adoption of state legislation that effectuated private efforts to perpetuate the subordinate status of blacks. The 1866 act's aim was to eradicate such legislation, and in

the specific context of contracts, to invest blacks with the capacity to enforce their right to contract. Congress never intended to compel individuals to enter into contracts against their will. Given the substantial impact on individual liberty that such a compulsion to contract entails, this Court should not lightly infer an intent by Congress to do so.

1. A. The post-Civil War South experienced tremendous economic dislocation. Though southern leaders applied peer pressure and other tactics to encourage their fellow landowners to voluntarily limit employment opportunities and restrict wages, "white employers vigorously competed with one another for black labor." Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. Chi. L. Rev. 1161, 1161 (1984); *see also* R. Higgs, *Competition and Coercion* 37-61 (1977). Pro-slavery philosopher George Fitzhugh warned his fellow southerners, "We must have a black code"; not to restore "slavery such as that which has been recently abolished," but to implement "some sort of subordination of the inferior race that will compel them to labor." J. McPherson, *The Struggle for Equality* 302 (1964). The black codes thus represented "attempts to enforce a labor-market cartel among white employers that could not be enforced in any other way." Roback at 1162.

This process of effectuating private discrimination through the coercive apparatus of the state was chronicled by Maj. Gen. Carl Schurz in his Report on the Condition of the South, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1866). Schurz observed that in the economically ravaged South of 1865, "free negro labor being the only thing in immediate prospect, many ingenious heads set

about to solve the problem, how to make free labor compulsory by permanent regulations." *Id.* at 22. Schurz reported a number of local laws designed to keep blacks subservient, *id.* at 23-24, and he warned that "although the freeman is no longer considered the property of the individual master, he is considered the slave of society, and all independent state legislation will share the tendency to make him such." *Id.* at 45.

As Schurz predicted, several southern states passed laws restricting the competitive labor market prior to the 1866 Civil Rights Act. A number of states in 1865 and early 1866 passed "enticement" laws, making it a crime for one employer to try to hire a laborer away from another. Roback at 1166. Six states also passed vagrancy statutes prior to the 1866 Act, making it unlawful to be unemployed. 6 C. Fairman, *The History of the Supreme Court of the United States* 1185 n.191 (1971). An 1865 Mississippi law, for instance, provided that any black laborer who quit during his contract term would forfeit a year's wages and could be arrested and returned to the employer at the laborer's expense. G. Stephenson, *Race Distinctions in American Law* 47 (1910). Other laws, such as oppressive licensing regulations, prevented freemen from applying in their own behalf the skills they had learned as slaves. C. Bolick, *Changing Course: Civil Rights at the Crossroads* 25 (1988). In sum, the black codes comprised an interwoven tapestry that restored as closely as practicable the feudal society that existed in the pre-Civil War South, and "were intended to accomplish what race prejudice could not do by itself." Roback at 1182.

Though the black codes were of recent vintage, the members of the 39th Congress were keenly aware of legal

restrictions on black economic opportunities, not only through reports from the South,[1] but also in light of the fact that the black codes were modelled after laws in northern states governing free blacks that were passed in the 1840s and '50s. G. Stephenson at 36-38. Given that the black codes were what made private discriminations effective, it is well understandable that "the principal object of the legislation was to eradicate the Black Codes." *General Building Contractors*, 458 U.S. at 386.

Indeed, Rep. Samuel Shellabarger stressed that the "bill does not reach mere private wrongs, but only those done under color of State authority. . . . [i]ts whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this act." Cong. Globe, 39th Cong., 1st Sess. 1293-1294. Rep. Burton Cook explained more fully the objective of the bill. He asked, "What is the situation of affairs for which we are called to legislate for four million human beings who have been set free from chattel slavery?" *Id.* at 1123-1124. In six southern legislatures, he observed, laws had been passed that were "so malignant" and "subversive of their liberties" that military commanders issued orders forbidding their enforcement. *Id.* at 1124. Cook continued,

[1] The Schurz report was before Congress while it was considering the 1866 Act, but the hearings of the Joint Committee on Reconstruction, upon which petitioner relies heavily, see Brief for Petitioner on Reargument at 27-40, were not completed until after the bill became law, and the committee's report was not prepared until even later. 6 C. Fairman at 1184.

> The time when these men can be protected by the military power will cease. . . . Suppose. . . . these States are restored to all the rights of sovereign States within this Union, and they carry out the same spirit they have already manifested toward these freedmen. . . . [T]hose states have already passed laws which would virtually reenslave them. . . . I know of no way by which these men can be protected except it be by the action of Congress, either by passing this bill or by passing a constitutional amendment.

Id. at 1124. Likewise, Sen. James F. Wilson, noting that Gen. Grant had issued orders setting aside black codes, explained that "[t]his measure is called for because these reconstructed Legislatures, in defiance of the rights of the freedmen and the will of the nation . . . , have enacted laws nearly as iniquitous as the old slave codes that darkened the legislation of other days." *Id.* at 603. This legislative history demonstrates that Congress recognized that private discrimination was being effectuated through state action, hence requiring federal legislation aimed at removing this coercive tool from the hands of the oppressors. *See generally Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 450-472 (1968) (Harlan, J., dissenting).

B. If § 1981 is derived from the 1866 Act and thus enforces the 13th Amendment, as Petitioner contends, it must be addressed to removing a condition of the slavery that the amendment abolished. In the context of contract rights, the condition of slavery that § 1981 cures is the slaves' lack of *legal capacity* to contract -- a disability (like the others cured by § 1981) that is visited upon individuals by state action, not by private action.

As Justice White observes in his *Runyon* dissent, "Congress' purpose . . . was solely to grant all persons

equal capacity to contract." *Runyon*, 427 U.S. at 205 (White, J., dissenting). The "inflexible rule of the law of African slavery" was that "the slave was incapable of entering into any contract." *Hall v. United States*, 92 U.S. 27, 30 (1875). After the Civil War the right to contract was deemed a fundamental civil right, yet was being frustrated by the refusals of southern governments to enforce blacks' contractual rights and by state laws that interfered with freedom of contract.

Rep. Martin Thayer, for instance, denounced the "tyranny of laws" by which a man "may be deprived of the ability to make a contract" – "laws which, if permitted to be enforced, would strike a fatal blow at the liberty of the freedman and render the constitutional amendment of no force or effect whatever." Cong. Globe, 39th Cong., 1st Sess. 1152-53. The bill, he explained,

> after extending these fundamental immunities of citizenship to all classes of people in the United States, simply provides means for the enforcement of these rights. . . . How? . . . It imposes duties upon the judicial tribunals of the country which require the enforcement of these rights. It provides for the administration of laws to protect these rights. It provides for the execution of laws to enforce them.

Id. at 1153. The 1866 Act, then, was intended to cure a defect of state law and administration of justice. As Rep. Shellabarger confirmed, "its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former conditions in slavery." *Id.* at 1293. Since the condition of slavery at issue here – lack of legal capacity to make and enforce contracts – is a function of state law and not private action, the 1866 Civil Rights Act is plainly limited to curing impediments and discriminations created by state action.

2. Even if § 1981 was intended to reach private acts against blacks,[1] such as physical interference with the rights protected by the laws, it is quite another matter to apply the law to that species of private conduct at issue in *Runyon*, 427 U.S. at 170-171 – a private individual's *refusal* to contract.

In construing the language of § 1981 that gives all citizens "the *same* right . . . to make and enforce contracts . . . as is enjoyed by *white* citizens" (emphasis added), Justice White notes that "[w]hites had at the time . . . no right to make a contract with an unwilling private person, no matter what that person's motivation for refusing to contract." *Id.* at 194 (White, J., dissenting). Indeed, the jurisprudence of the period held that the "very essence" of a contract is "[m]utual assent to its terms." *State of Louisiana v. Mayor and Administrator of City of New Orleans*, 109 U.S. 285, 288 (1883). The legislative history makes clear that Congress did not intend to supplant this vital aspect of contractual freedom. Rep. Cook, for instance, declared that "[w]e are not pointed to one single right now possessed of a single white man in this Government touched or impaired by the provisions of this bill." Cong. Globe, 39th Cong., 1st Sess. 1184.

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[1] Many of the acts recounted in petitioner's brief that are described as private, such as violence, extortion, and failure to comply with contractual terms, can only be effectuated through a race-conscious administration of justice, which is a form of state action.

This very distinction between capacity to enter into and enforce contracts, which Congress intended to extend to all persons, and the right to refuse to enter into contracts, which Congress did not intend to disturb, formed the basis for this Court's decision in the *Civil Rights Cases*, 109 U.S. 3 (1883), striking down provisions of the Civil Rights Acts of 1875.[5] The Court observed that lack of capacity to enter into contracts was a badge of slavery redressable by congressional action pursuant to the 13th Amendment, but that the "denial to any person" of public accomodations could not be redressed under the amendment. *Id.* at 21. As Justice Bradley explained, civil rights "cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings." *Id.* at 17. Interferences with the right to contract or hold property, the Court declared, are "simply a private wrong, or a crime of that individual; . . . but if not sanctioned in some way by the State, . . . his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress." *Id.* at 17.

Failure of states to afford such vindication of rights was, as earlier noted, precisely the evil to be corrected by

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[5] The argument of *amici* Fonner, *et al.*, that the state/private action distinction was not recognized in late 19th century jurisprudence, see Brief of Fonner, *et al.*, at 11-13, is puzzling in light of the reliance on this distinction by the Court in this 1883 decision. If Congress or the Court did not make more of this distinction, it is only because at that time "[i]t would have been a striking novelty in American jurisprudence . . . to require a person to make a contract with someone he chooses not to contract with." Avins, *The Civil Rights Act 1866, The Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. Cal. L. Rev. 274, 306 (1967).

§ 1981. Petitioner presents no evidence whatsoever that Congress intended to compel individuals to enter into contracts against their will.

3. This interpretation is consistent not only with the statute's plain language, legislative history, and early interpretations by this Court, *see e.g., Civil Rights Cases, supra*, but also with subsequent congressional action. The 14th Amendment, limited to state action, was ratified in 1868; and Congress enacted § 1981 in its present form in 1870 pursuant to that amendment. As this Court noted in *General Building Contractors*, 458 U.S. at 389-90, "In light of the close connection between [the 1870 Act] and the Amendment, it would be incongruous to construe the principal object of . . . § 1981, in a manner markedly *different* from that of the Amendment itself."

Moreover, Congress subsequently passed the Civil Rights Act of 1875 (18 Stat. 335) guaranteeing equal access to public accommodations. If Congress had intended earlier legislation to cover such instances, as Petitioner would have it, why would it soon thereafter pass new legislation covering the same subject?[6]

Finally, Congress passed sweeping civil rights legislation in the 1960s. In particular, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, was "design[ed] as a comprehensive solution for the problem of invidious discrimination in employment." *Johnson v.*

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[6] In *Runyon*, 427 U.S. at 189 (Powell, J., concurring), Justice Powell suggests that § 1981 extends only to private "commercial relationship(s) offered generally or widely," but that is exactly what the subsequent Civil Rights Act of 1875 was designed to reach.

Railway Express Agency, 421 U.S. 454, 459 (1975). Petitioner suggests § 1981 "fill[s] in gaps in the coverage of federal anti-discrimination statutes" and provides "supplemental procedures and remedies." *see* Brief for Petitioner on Reargument at 113, but it would have required amazing prescience for Congress in the 19th century to supplement and fill in the gaps of laws that would be passed nearly a century later. In reality, of course, exactly the converse was true: Congress in each instance was acting to supplement and fill in the gaps it perceived were left open by the legislation passed in 1866 and 1870. If additional coverage is necessary and desirable, that is a "task appropriate for the Legislature, not for the Judiciary." *Runyon*, 427 U.S. at 212 (White, J., dissenting).

4. When litigants ask this Court to apply a general statute in a way that would limit individual liberty, especially a right that is explicitly protected by the Constitution such as freedom of contract, *see* U.S. Const. art. I, § 10, this Court should exercise special caution and restraint. This is true even where the underlying private conduct may be repugnant. *Cf. Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds"); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (private racial preferences).

The tension inherent in petitioner's argument is that this Court should apply a law that was intended to *expand* contractual liberty to all Americans in a way that would limit such liberty for everyone. That such liberty is sometimes exercised in ways that society finds offensive does not give this Court license to expand a statute

beyond its intent. To do so requires this Court to substitute its values for the values of society generally, as expressed in the nation's Constitution and statutes. Here no need exists for this Court to so apply § 1981, since Congress has drawn in Title VII a balance between such individual liberty interests as freedom of contract, freedom of association, and free exercise of religion on one hand, and the government's interest in eradicating employment discrimination on the other. *See, e.g.*, Title VII, § 701(b) (exempting Indian tribes from coverage); §§ 702 and 703(e)(2) (religious exemptions); § 701(b)(2) (exemption for bona fide membership clubs). This Court should refrain from applying a generally worded statute in a way that might disrupt this delicate accommodation of competing interests and that would further restrict individual liberty without a clear mandate from Congress to do so.

II. *STARE DECISIS* SHOULD NOT BAR THIS COURT'S REEXAMINATION OF *RUNYON* UNDER THE UNUSUAL CIRCUMSTANCES OF THAT DECISION

This Court has reexamined its prior statutory interpretations in a variety of contexts applicable to the present situation. Statutory interpretations were overruled, for instance, where, as here, the decision departed from prior precedent[5] and misapprehended legislative history.

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[5] *Runyon* itself was a significant departure from *stare decisis*, overruling a long line of cases in which the Court indicated § 1981 applied only to private action. *See e.g., Hurd v. Hodge*, 334 U.S. 24 (1948); *Corrigan v. Buckley*, 271 U.S. 323 (1926); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Civil Rights Cases*, *supra*; *Neal v. Delaware*, 103 U.S. 370 (1880); *Virginia v. Rives*, 100 U.S. 313 (1879); *Strauder v. West Virginia*, 100 U.S. 303 (1879).

Monnell v. *Dept. of Social Services of the City of New York*, 436 U.S. 658, 695-701 (1978), *see also Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 72 (1938); and where the interpretation has proven "unworkable." *See, e.g., Garcia* v. *San Antonio*, 469 U.S. 528, 537 (1985). The Court has reversed its prior errors even after affirming them, *see, e.g., Monnell*, 436 U.S. at 696 (earlier decision affirmed three times); *Helvering* v. *Hallock*, 309 U.S. 108, 123 (Roberts, J., dissenting) (1946) (earlier decision followed at least 50 times); and even where Congress has re-enacted the statute at issue without altering the Court's interpretation. *Id.* Although properly declining to "lightly overrule recent precedent," *Garcia*, 469 U.S. at 557, this Court has declared that "we cannot evade our own responsibility for reconsidering in the light of further experience, the validity of distinctions which this Court has itself created." *Helvering*, 309 U.S. at 122.

Runyon is such a substantial departure from prior precedent and legislative history – a departure that requires the Court to engage in further activism as each successive issue never contemplated by the law's sponsors arises – that this Court "should not continue to confound confusion." *Jones* v. *United States*, 366 U.S. 213, 221 (1960), but should correct its error.[6]

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[6] Since § 1981 "reach[es] relatively few situations not also covered by Title VII," B. Schlei and P. Grossman, *Employment Discrimination Law* 668 (2d ed. 1983), the only persons who might rely on *Runyon* to their detriment in the employment context would be those who seek to evade the procedural or remedial limitations carefully framed by Congress in Title VII.

1. When this Court decided in *Runyon* that § 1981 applies to private refusals to contract, it "amounted to the equivalent of new legislation enacting a broad, general purpose statute prohibiting discrimination against blacks." Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 Yale L. J. 1441, 1476 (1975). As Justice White warned, once § 1981 was loosed from its statutory moorings, the Court would "be called upon to balance sensitive policy considerations – which have never been addressed by any Congress – all under the guise of 'construing' a statute." *Runyon*, 427 U.S. at 212 (White, J., dissenting).

Justice White's warning has proved prophetic. Whenever a court departs from a statutory mandate, in essence creating a new statute, it forces the Court to confront issues with no certain guideposts; and the further it strays from legislative intent, the more it becomes a law maker rather than a law interpreter. That is the unfortunate and improper role the Court assumed when it decided *Runyon*.

In the intervening years, this Court and other courts have been repeatedly called upon to decide how far § 1981 regulates private conduct and how it interrelates with Title VII. For instance, does it supplant Title VII's private club exemption? *See Runyon*, 427 U.S. at 172 n.10. Does it extend to "personal contractual relationship[s]"? *See id.* at 188 (Powell, J., concurring). Does § 1981 provide a cause of action to federal employees? *See Brown* v. *General Service Administration*, 425 U.S. 820 (1976). Does it cover all aspects of the employment relationship, such as harassment by the employer, as petitioner asks this Court to hold? This confusion is exacerbated by decisions that appear to contradict one another. *Compare, e.g., Runyon*

(holding that § 1981 applies to private action) with *General Building Contractors*, *supra* (holding that § 1981 requires a showing of intent since it enforces the 14th Amendment).

In *Runyon*, 427 U.S. at 188 (Powell, J., concurring), Justice Powell noted that no "'bright line' can be drawn that easily separates the types of contract offer within the reach of § 1981 from the type without." The source of the blurred lines is *Runyon* itself. In reality, Congress did supply a "bright line": it intended § 1981 to apply to state action only. Moreover, Congress subsequently enacted broad remedial legislation to deal specifically with private discrimination in a wide variety of contexts. The many lines drawn by Congress in that legislation – procedural, substantive, remedial – resulted from extensive and careful deliberation that is entrusted by our Constitution to the legislative branch. This Court can remove itself from the self-perpetuating abyss of judicial lawmaking only if it overrules *Runyon*.

2. Petitioner contends that the failure of Congress to enact legislation reversing *Runyon* amounts to congressional adoption of the decision. Brief for Petitioner on Reargument at 98-97. This Court, however, has repeatedly hesitated to "place on the shoulders of Congress the burden of the Court's own error." *Girouard* v. *United States*, 328 U.S. 61, 70 (1946). Rather, the Court has advised "[i]t would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines." *Helvering*, 309 U.S. at 119. Thus, as Justice Brennan declared in *Boys Markets* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 242 (1970), "the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision." Indeed, the Court is free to correct its error even if "[m]any

efforts" were made unsuccessfully in Congress to change the decision. *Girouard*, 328 U.S. at 69.

The notion that Congress may conceivably cure a judicial misinterpretation certainly does not give the Court *carte blanche* authority to override the purpose of a statute or use it to "fill in the gaps" of remedial coverage. Given the dynamics of the political process and the presence of special interest groups that can effectively block much legislation, the Court is in the best position to police its own excesses.

This self-policing function is especially appropriate in civil rights cases. Our nation's two century-old quest to make good on its promise of civil rights rests on an often fragile popular consensus grounded in certain core ideals. The civil rights laws generally reflect the outermost limits of that consensus. America's commitment to civil rights depends in large measure on the judiciary's fidelity to those laws. See C. Bolick at 53-75. In *Runyon*, the Court departed in a major way from the intent of one such law. It should confess error and return to Congress its vital role as maker of the laws.

CONCLUSION

For the foregoing reasons, we urge this Court to reconsider and overrule *Rutgon*.

Respectfully submitted,

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